Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1997

DECHARLEUNO J. HALL,

Petitioner,

v.

ATLANTA PUBLIC SCHOOL SYSTEM,

Respondent.

Petition for Writ of Certiorari
To the United States Court of Appeals
For the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Michael Weinstock, Esq.
Counsel of Record
Georgia Bar No. 746454

Louis R. Cohan, Esq.
Georgia Bar No. 173357

Catherine M. Banich, Esq.
Georgia Bar No. 260514

Weinstock & Scavo, P.C.
Suite 300
3405 Piedmont Road, N.E.
Atlanta, Georgia 30305
(404) 231-3999

Balmar Legal Publishing Department, Washington, D.C. (202) 682-9800

QUESTIONS PRESENTED

The Questions Presented are whether the Eleventh Circuit rendered a decision in conflict with its own precedent, with the decisional law of other circuits and with the provisions of the IDEA when it concluded as follows:

I. That Respondent Atlanta Public School System discharged its duty to notify Petitioner of his procedural rights and remedies under the Individuals with Disabilities Education Act;

II. That Petitioner was not excused from exhausting administrative remedies under the Individuals with Disabilities Education Act even though Respondent failed to notify Petitioner of his procedural remedies and even though exhaustion of administrative remedies would be futile and inadequate; and

II. That Petitioner, rather than Respondent Atlanta Public School System, bore the burden of safeguarding his rights as a handicapped child under the Individuals With Disabilities Education Act.

LIST OF PARTIES

There are no parties to this proceeding other than those which appear in the caption of this case.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Decharleuno J. Hall, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on April 11, 1997, in order to resolve the important issues presented herein.

OPINIONS BELOW

The unreported Judgment and Opinion of the United States Court of Appeals for the Eleventh Circuit, entered April 11, 1997, which give rise to this Petition are attached at Appendices A and B, respectively.

The unreported Order and Judgment of the United States District Court for the Northern District of Georgia, entered on May 2, 1996, dismissing Petitioner's Complaint, are attached at Appendices C and D, respectively. The unreported Order of the United States District Court for the Northern District of

Georgia denying Petitioner's Motion for Reconsideration is attached at Appendix E.

The Orders of the United States Court of Appeals for the Eleventh Circuit, entered on July 1, 1997, denying Petitioner's Petition for Rehearing and Suggestion of Rehearing En Banc are attached at Appendices F and G, respectively.

STATEMENT OF JURISDICTION

The Judgment sought to be reviewed was entered on April 11, 1997.

Petitioner filed a Suggestion of Rehearing En Banc on May 2, 1997. The United States Court of Appeals for the Eleventh Circuit treats a Suggestion of Rehearing En Banc as both a Suggestion of Rehearing En Banc and a Petition for Rehearing before the original panel. *See*, 11th Cir. R. 35-6.

The United States Court of Appeals for the Eleventh Circuit entered its Orders denying Petitioner's Petition for Rehearing and Suggestion of Rehearing En Banc on July 1, 1997. *See*, Appendices F and G. The instant Petition has been filed within ninety (90) days of the entry of the Orders denying Petitioner's Petition for Rehearing and Suggestion of Rehearing En Banc. Accordingly, the instant Petition for Writ of Certiorari is timely. *See*, Supreme Court Rule 13.4 and *Missouri v. Jenkins*, 495 U.S. 33, 45-50, 110 S.Ct. 1651, 1660-1662 (1990).

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THIS CASE

20 U.S.C. § 1415. *See*, Appendix H for the text of this statute.

STATEMENT OF THE CASE

Petitioner, Decharleuno J. Hall ("Hall"), is blind. In spite of his disability, Hall wanted to become a member of the

Southside High School ("Southside") track team. On his own initiative, Hall received permission from his physician to run track and cleared all of the administrative hurdles necessary to participate on the track team. For more than three and one-half (3 ½) years, however, the Atlanta Public School System ("the APSS") managed to prevent Hall from running track at Southside High School without actually giving Hall a "yes" or "no" answer. The APSS also failed to notify Hall that there were procedural remedies available to him under the Individuals With Disabilities Education Act ("IDEA"). Hall's high school career came and went without Hall ever running track for Southside or ever being provided an opportunity to avail himself of the procedural remedies available under the IDEA.

Throughout his high school years, Hall sought the assistance of coaches, teachers, school administrators, and ultimately APSS's Office of Equal Educational Opportunities ("OEEO"). Because all of these individuals failed to address Hall's requests to participate on the track team, Hall filed the instant action averring that the APSS had violated his rights under 42 U.S.C. § 1983, The Rehabilitation Act of 1973, 29 U.S.C. § 794, *et. seq.*, and the Americans With Disabilities Act, 42 U.S.C. § 12132, *et. seq.*[1] Throughout the three-and-a-half (3½) years that Hall sought to run track, the APSS never mentioned the Individuals with Disabilities Education Act. In fact, the remedies allowed by the Act were not available to Hall, because the APSS never actually denied his request to run track. Rather, the APSS continued to expand the approval process so the result was that Hall was not permitted to run track, nor did he have rights available pursuant to the IDEA. It was not until Hall filed this lawsuit that the APSS for the

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[1] Hall asserted federal question jurisdiction pursuant to Title 28 U.S.C. § 1331, because the action arose under the laws of the United States, and under Title 28 U.S.C. § 1343(a), because the action was brought pursuant to Title 42 U.S.C. § 12132, Title 29 U.S.C. § 794, and Title 42 U.S.C. § 1983.

first time raised the issue of exhaustion of administrative remedies, not as a safeguard to protect Hall's rights as a handicapped child, but as a bar to the instant action and to the enforcement of Hall's rights as a handicapped child under the IDEA.

In his freshman year at Southside, during the 1991-92 track season, Hall first expressed his interest in running track to the boys' varsity coach, Coach Phillips. Coach Phillips initially assured Hall that he would assist him in his desire to run track. Hall passed the necessary physical examination, received permission from his physician to participate, and completed and turned in all necessary forms to Coach Phillips in a timely fashion. However, Coach Phillips "stalled" Hall by telling him that Phillips needed to speak with Coach Aaron Tookes, Hall's vision-impaired teacher, before Hall could participate. Hall attended each and every practice, repeatedly asking to be a part of the team, but Coach Phillips just kept brushing him off. (R1-1-3&4).[2]

In Hall's tenth grade year at Southside (1992-93), Hall once again asked to be made a part of the track team. Even though Hall passed the required physical examinations and turned in all of the necessary paperwork, Coach Phillips again failed to respond to Hall's requests to participate in practices and competitions. (R1-1-4).

Feeling increasingly frustrated, Hall turned to the Athletic Director of Southside, Fred Price ("Price"), for assistance. As Coach Phillips had done, Price initially assured Hall that he would help him realize his goal of

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[2] The citations herein refer to pleadings as they are listed on the Docket Sheet which is prepared by the Clerk's office of the United States Court of Appeals for the Eleventh Circuit. The notation "R1" refers to Volume 1 of the record. The number "1" refers to the first pleading entered on the Docket Sheet. The numbers "3&4" refer to the page numbers of the subject pleading. The instant citation, therefore, is to pages 3 and 4 of Plaintiff's Complaint, which is the first pleading in Volume 1 of the record.

running track for Southside. Price told Hall repeatedly that he would help him. Unfortunately, however, Price, like Coach Phillips, soon began to evade and ignore Hall's requests for assistance. Again, Hall attended each and every practice, but the 1992-93 track season came and went, and Price never gave Hall any response to his requests for permission to run track. (R1-1-4).

In February 1994, during his junior year at Southside (1993-94), Hall once again registered for the Southside track team. At this point, Coach Phillips had been replaced by Coach Reeves, as the varsity boys' track coach. For the third consecutive year, Hall took and passed all of the required physical exams and turned in all of the necessary forms to his new coach. (R1-1-5).

Coach Reeves, like Coach Phillips and Fred Price, avoided making a decision about whether Hall could run with the track team by "stalling him." Specifically, during the first two weeks of the track season, Coach Reeves claimed that various forms were missing. However, after Hall reminded Coach Reeves that he had in fact turned in his forms and asked for a second set of forms to complete, Coach Reeves claimed that he located the "missing" forms. However, when Hall asked Reeves if he could attend an upcoming track meet, and attempted to give Reeves the money for the bus ride to the track meet, Reeves laughed at Hall, refused his money, and sarcastically asked, "What are you going to do there?" (R1-1-5).

During the third week of the 1994 track season, Hall asked Reeves for a running schedule and uniform. In addition, through his own efforts, Hall found two (2) members of the boys' track team who agreed to be companion runners for him. However, Reeves refused to allow the other two (2) boys to provide Hall with assistance. (R1-1-7).

During the fourth week of the 1994 track season, Coach Reeves informed Hall that he could run track after Walter Wade, the Assistant Athletic Director for the APSS granted approval. Hall immediately called Wade, and asked for his

assistance. Like the others, Wade assured Hall that he would help him to become a member of the Southside track team. (R1-1-7&8).

In or around April 1994, Price met with Hall and Coach Tookes, and informed them that Wade had decided that Hall could run track if he obtained permission from a physician. Coach Tookes explained to Price that Hall had seen a physician in February 1994, and had received permission to run track. Coach Tookes then asked Price what other information was required which had not already been provided. Price stalled Hall once again, by stating that he would get back to Hall after speaking with Wade. (R1-1-8).

Also in or around April 1994, Hall's mother contacted the Office of Equal Educational Opportunities (OEEO) of the APSS, twice, by telephone and letter, to register a complaint that Hall had been discriminated against on the basis of his disability. The OEEO coordinator, Renee Ivey, assured Ms. Hall that the matter would be reviewed. However, Hall and his mother heard nothing further from the OEEO, and the 1994 track season passed without any word from Price, Reeves or Wade; without Hall ever having been allowed to participate in track; and with no action being taken by OEEO, the APSS, or Southside. (R1-1-10).

On June 30, 1994, after the 1994 school year ended, Hall's mother filed a formal written complaint with the APSS, and the APSS scheduled an eye exam for Hall. (R1-1-11). Not surprisingly, however, Hall stopped believing the systematic reassurances that he would be accommodated the next year. Three (3) years of such assurances had produced no results. Consequently he took and passed his high school equivalency ("G.E.D.") exam in the summer of 1994. (R1-1-11).

The APSS did not issue a decision on Hall's Complaint, however, until *February 7, 1995*, nearly eight (8) months after the complaint with the OEEO was filed. The decision came by way of a letter to Hall's mother dated February 7, 1995. (R1-7-16 & 17 and Appendix I). At this point, Hall was no

longer attending Southside High School. This decision should have been rendered three years earlier, during the 1991-1992 school year, when Hall first asked to run track. By the time the APSS notified Hall of its decision, it was too late for Hall as a practical matter, to avail himself of the procedural remedies available under the IDEA.

Furthermore, this letter of February 7, 1995, did not mention the IDEA. Rather, the APSS merely informed Hall's mother that it was not required to accommodate Hall under *Section 504 of the Rehabilitation Act of 1973.* (See Appendix I).

Nowhere in this letter did the APSS inform Hall or his mother that it was attempting to determine whether Hall had been denied a "free appropriate public education" under the IDEA. Nowhere in this letter did the APSS inform Hall or his mother of their procedural rights and requirements *under the IDEA*. In fact, the first time the APSS made any mention of the IDEA was in its Motion to Dismiss, asking the District Court to bar Hall's Complaint on the grounds that he failed to exhaust the same administrative remedies to which the APSS denied Hall access. (R1-3).

The District Court granted the APSS's Motion to Dismiss concluding that Hall's Complaint should be dismissed due to his failure to exhaust administrative remedies. (See Appendices C and D). The Eleventh Circuit affirmed the District Court's decision. (See Appendices A and B). Both courts relied heavily upon the letter dated February 7, 1995, and the APSS' argument that this letter operated to inform Hall and his mother of their rights under the IDEA. (See Appendices B and C). In addition, both the District Court and the Eleventh Circuit concluded that Hall was the one to be blamed for waiting three years before filing a complaint with the APSS. (See Appendices pp. a-5 and a-10).

In affirming the decision of the District Court to dismiss Hall's Complaint for failure to exhaust administrative remedies, the Eleventh Circuit departed from the provisions

of the IDEA governing procedural safeguards, from the decisional law of other United States Courts of Appeals and from its own precedents. The IDEA mandates that the School District fully inform handicapped children and their parents of all of the procedural remedies made available to them under the IDEA. 20 U.S.C. § 1415. The Fifth and Second circuits hold that when a school district is to blame for the failure of handicapped children and their parents to exhaust procedural remedies available under the IDEA, then those children and their parents are excused from exhausting those procedural remedies. This Court and several Courts of Appeals hold that exhaustion of remedies under the IDEA is not required where exhaustion of remedies would be futile or inadequate. Finally, the Fifth Circuit further holds that the burden of safeguarding a handicapped child's procedural rights under the IDEA rests not on the child but upon the school district.

Contrary to the foregoing, the Eleventh Circuit faulted Hall for failing to exhaust administrative processes to which the APSS denied Hall access, required Hall to exhaust administrative remedies when exhaustion of remedies would be futile and inadequate and placed the burden of safeguarding Hall's rights as a handicapped child on Hall. Accordingly, Hall has filed this Petition for Writ of Certiorari and respectfully requests that this court issue a Writ of Certiorari to review the Opinion and Judgment of the Eleventh Circuit affirming the District Court's decision to dismiss Hall's Complaint for failing to exhaust administrative remedies under the IDEA.

REASONS FOR GRANTING THE WRIT

I. THE ELEVENTH CIRCUIT RENDERED A DECISION IN CONFLICT WITH ITS OWN PRECEDENTS, THE DECISIONAL LAW OF OTHER CIRCUITS AND THE IDEA WHEN IT CONCLUDED THE APPS DISCHARGED ITS DUTY TO NOTIFY HALL OF HIS ADMINISTRATIVE RIGHTS AND REMEDIES UNDER THE IDEA.

A. The APSS Was Under A Duty To Notify Hall Of His Administrative Rights And Remedies Under The IDEA.

The procedural requirements of the IDEA are outlined in 20 U.S.C. § 1415.[3] These procedural safeguards include, *inter alia*, (1) written prior notice to the parent or guardian whenever the school district proposes or refuses to initiate or change the child's identification, evaluation or educational placement, or the provision of a free, appropriate public education. § 1415(b)(1)(C); (2) a requirement that the district *fully inform* the parents or guardian of the child of *all procedures available pursuant to § 1415*, § 1415(b)(1)(D); and (3) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free, appropriate public education to such child, § 1415(b)(1)(E) (emphasis supplied).

The Eleventh Circuit itself has made a point of noting the importance of informing parents of handicapped children of all of the procedures available under the IDEA, because "in most cases, the handicapped students and their parents lack the wherewithal, either to know or to assert their rights under the [IDEA]." *S-1 v. Turlington*, 635 F.2d 342 (5th Cir.

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[3] The full text of this provision is reproduced at Appendix H.

1981).[4] *See also*, *Doe v. Alabama State Dept. of Educ.*, 915 F.2d 651, 661 (11th Cir. 1990).

This Court has also made a point of noting the importance of informing parents of handicapped children of all of the procedures available under the IDEA: "When the elaborate and highly specific procedural safeguards embodied in Section 1415 are contrasted with the general and somewhat imprecise substantive admonitions contained in the Act, we think that the importance Congress attached to these procedural safeguards cannot be gainsaid." *Hendrick Hudson Central Sch. Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 205-06, 102 S. Ct. 3034, 3050, 73 L.Ed.2d 690 (1982).

Other Circuits as well have noted the importance of the procedural safeguards contained in Section 1415. The Fourth, Fifth and Sixth Circuits all hold that failure to meet the IDEA's procedural requirements is an adequate basis in itself for holding that the school district failed to provide the child a free, appropriate public education in violation of the IDEA. *See*, *Tennessee Dept. of Mental Health v. Paul B.* 88 F.3d 1466, 1478-79 (6th Cir. 1996); *Jackson v. Franklin County Sch. Bd.*, 806 F.2d 623, 629 (5th Cir. 1986); *Hall by Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 634-35 (4th Cir. 1985).

Clearly, the school system or agency is required, in no uncertain terms, to provide handicapped children and their parents or guardians with *full* notice of *all* of the procedural rights and remedies available pursuant to Section 1415 of the IDEA *prior* to making any decision with respect to the

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[4] *S-1 v. Turlington*, 635 F.2d 342 (5th Cir. Unit B 1981) was decided January 26, 1981. All decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981 are binding precedent on the Eleventh Circuit. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981).

handicapped child's educational placement. *See* 20 U.S.C. § 1415(b)(1)(C).

This notification, according to the Eleventh Circuit, must include a "full explanation of the procedural safeguards available to the parents; a description of the action proposed or refused; an explanation of why the action was proposed or refused; a description of any options the school considered, and why those options were rejected; a description of the evaluation procedures used to form the basis of the proposal or refusal; and a description of other relevant factors." See *Doe v. Alabama State Dept. of Educ.*, 915 F.2d 651, 660 (11th Cir. 1990) (citing 34 CFR § 300.505(a)). The APSS has failed to demonstrate that it discharged *any* of the foregoing obligations in the instant case.

B. The APSS Failed To Take Any Notice-Triggering Action And To Notify Hall Of His Administrative Rights And Remedies Under The IDEA.

Obviously, the first step in the procedural process under the IDEA is the taking of some action on the part of the school district which triggers a handicapped child's right to administrative review, and the concomitant requirement of exhaustion of those remedies. Unfortunately for Hall, in the present case, the APSS avoided making any decision or taking any other notice-triggering action with regard to whether Hall would be permitted to run track. When the APSS finally did reach a decision, Hall's high school years were over.

The Eleventh Circuit Court relied exclusively upon the letter of February 7, 1995, in concluding that the APSS had discharged its duty to notify Hall of his rights under the IDEA. (See p. a-5). Unfortunately, the APSS's letter of February 7, 1995, did not sufficiently apprise Hall of his rights under the IDEA. (Appendix I). Nowhere in the APSS' letter to Hall's mother is the IDEA mentioned. (Appendix I).

According to the IDEA and to Eleventh Circuit precedent, the school system discharges its duty under the

IDEA only when it "*fully informs* the parents or guardian of the child . . . of *all procedures* available pursuant to *this section* [§ 1415 of the IDEA]." 20 U.S.C. § 1415(b)(1)(D) (emphasis supplied). *See, also, Doe v. Alabama State Dept. of Educ.*, 915 F.2d 651 (11th Cir. 1990).

What the APSS informed Hall and his mother of was, "his right to appeal" the decision. (R1-7-16 & 17). Simply informing Hall and his mother that they have a "right to appeal" the decision is not the same thing as a "full explanation of the procedural safeguards available to the parents" under the IDEA. *Doe v. Alabama State Dept. of Educ.*, 915 F.2d 651,660 (11th Cir. 1990).

Furthermore, the APSS merely informed Hall's mother in its letter dated February 7, 1995, that the APSS was not required to accommodate Hall under *Section 504 of the Rehabilitation Act of 1973.* (Appendix I). Nowhere in this letter did the APSS inform Hall's mother that it was attempting to determine whether Hall had been denied a "free appropriate public education" under the IDEA. Nowhere in this letter did the APSS inform Hall or his mother of their procedural rights and requirements *under the IDEA.* (Appendix I)

Other circuits make a distinction between administrative remedies available under the IDEA and administrative remedies available under other statutes or regulations. The Tenth Circuit held, in *Ass'n for Community Living v. Romer*, 992 F.2d 1040, 1045 (10th Cir. 1993), that the Plaintiff's exhaustion of administrative processes under the Education Department General Administration Regulations ("EDGAR") by 34 CFR. § 76.1-.910, was not an adequate alternative to exhausting administrative remedies under the IDEA, because the IDEA, unlike EDGAR, "was carefully tailored to ensure that complainants receive the benefits of a full administrative hearing prior to seeking judicial review." *Id.* at 1045. In this case, the APSS merely informed Hall of his "right to appeal" a decision made under Section 504 of the Rehabilitation Act of 1973, not the IDEA. Clearly, the APSS failed completely in

the discharge of its notification duties under § 1415(b)(1)(D) of the IDEA.

Indeed, *Glenn III v. Charlotte Mecklenberg Bd. of Educ.*, 903 F. Supp. 918, 921 (W.D. N.C. 1995), and *Buffolino v. Bd. of Educ. of Sachem Cent. Sch. Dist.*, 729 F. Supp. 240 (E.D. N.Y. 1990), amply illustrate, by comparison, the APSS's failure in providing the requisite notice in the present case. In each of these cases, the respective school districts sent the parents and students comprehensive guides to their substantive and procedural rights in layman's terms, notification of their right to attend and participate in hearings, and notification of their right to appeal and the deadlines and procedures for initiating such appeals. *See Buffolino*, 729 F. Supp at 243; and *Glenn III*, 903 F. Supp. at 918.

In the instant case, there was only the cryptic reference to Hall's right to appeal contained in the February 7, 1995 letter. There was absolutely no mention of (1) the IDEA; (2) deadlines; or (3) applicable procedure. (Appendix I). Thus, because there was no notice, as required by the Act, Hall was not obligated to exhaust administrative remedies which he did not know existed. Nevertheless, the Eleventh Circuit concluded that the letter of February 7, 1995, adequately apprised Hall of his rights under the IDEA.

II. THE APSS'S FAILURE TO COMPLY WITH THE PROCEDURAL REQUIREMENTS OF THE IDEA RELIEVED HALL FROM ANY OBLIGATION TO EXHAUST ADMINISTRATIVE REMEDIES.

The Second Circuit holds that handicapped children are excused from exhausting administrative remedies under the IDEA, where the school district is to blame for the plaintiffs' failure to exhaust those remedies. *See, J. G. v. Rochester City Sch. Dist. Bd. of Educ.*, 830 F.2d 444, 447 (2d Cir. 1987) (where Plaintiffs "assert the deprivation of their due process rights to proper notice and hearing, they cannot be faulted for the lack of an administrative hearing and appeal.") (citing *Quackenbush v. Johnson City Sch. Dist.*, 716 F.2d 141, 147-48 (2d Cir. 1983); and *Mrs. W. v. Tirozzi*, 832 F.2d 748, 756-757

(2d Cir. 1987)). *See also*, *Buffolino v. Bd. of Educ. of Sachem Cent. Sch. Dist.*, 729 F. Supp. 240 (E.D. N.Y. 1990)("the parents or guardians of a disabled child may institute a civil action pursuant to the [IDEA] without an impartial hearing, or an administrative appeal where the state is to blame for the failure of plaintiffs to exhaust their administrative remedies, because it somehow deprived them of their right to proper notice and a hearing in accordance with due process."), and *Mason v. Schenectady City Sch. Dist.*, 879 F.Supp 215, 218-19 (N.D.N.Y. 1993) (excusing Plaintiff's failure to exhaust administrative remedies when school district persistently failed to inform Plaintiff of the procedural safeguards available under Section 1415).

The Fifth Circuit follows this same rule. In *Ruth Anne M. v. Alvin Independent Sch. Dist.*, 532 F. Supp. 460 (S.D. Tex. 1982), the District Court held that where the plaintiffs were not notified of their administrative rights under the IDEA, and where the school district *took no notice-triggering action*, the plaintiffs' action was not barred by their failure to exhaust the administrative remedies under the Education of the Handicapped Act, now known as the IDEA. *Id.*, at 463 (emphasis supplied). In *Jackson v. Franklin County Sch. Bd.*, 806 F.2d 623, 629 (5th Cir. 1986), the Fifth Circuit Court of Appeals similarly held that if a Plaintiff "receives no notification [of her rights under the IDEA], she could hardly be faulted for not protecting rights she did not know existed [citation omitted]."

In this case, the Eleventh Circuit faulted Hall for not protecting rights he did not know existed. It was the APSS's own failure to notify Hall of his procedural remedies under the IDEA -- as it was required to do under Section 1415 of that Act -- which prevented Hall from exhausting those remedies. The APSS has failed to show that any action was taken on its part which would trigger Hall's right to notice and administrative review under the IDEA. The APSS failed to notify Hall of any decision or action taken concerning Hall's eligibility to participate on the track team, as is required under Section 1415. Finally, the APSS failed to provide Hall and his mother

with notification of all of their procedural rights and remedies under the IDEA, as required under Section 1415. Consequently, the Eleventh Circuit erred when it concluded that Hall should have exhausted administrative remedies under the IDEA before initiating the instant action, when Hall clearly did not know that those remedies existed.

III. EXHAUSTION OF REMEDIES WOULD HAVE BEEN FUTILE AT THE TIME HALL RECEIVED THE LETTER DATED FEBRUARY 7, 1995.

Where exhaustion of administrative process would be futile or inadequate, the Plaintiff is excused from exhausting administrative remedies under the IDEA before initiating an action in a District Court. *See Honig v. Doe*, 489 U.S. 305, 326, 108 S.Ct. 592, 605, 98 L.Ed.2d.686 (1984); *Doe v. Alabama State Dept. of Educ.*, 915 F.2d 651, 659 (11th Cir. 1990); *Ass'n for Retarded Citizens of Alabama v. Teague*, 830 F.2d 158, 160-61 (11th Cir. 1987); and *Ga. State Conf. of Br. of the NAACP v. State of Georgia*, 775 F.2d 1403, 1424 (11th Cir. 1985).

Other circuit courts have reached the same conclusion. In *J.G. v. Rochester City Sch. Dist. Bd. of Educ.*, 830 F.2d 440, 447 (2d Cir. 1987), the Second Circuit held that where plaintiffs asserted a deprivation of their due process rights of proper notice and a hearing, exhaustion of administrative remedies was not required, as adequate remedies were not reasonably available (citing *Quackenbush v. Johnson City Sch. Dist.*, 716 F.2d 141, 147-48 (2d Cir. 1993); and *Jose P. v. Ambach*, 669 F.2d 865, 867-68 (2d Cir. 1982)). In *Christopher T. v. San Francisco Unified Sch. Dist*, 553 F. Supp. 1107 (N.D. Cal. 1982), the District Court held that where the school district had refused to comply with the notice requirements under the [IDEA], the Plaintiffs were not required to exhaust the administrative remedies under the IDEA, because exhaustion would have been a futile gesture, and the administrative remedies available would not provide the plaintiffs with an adequate means for redressing their grievances. *Id.* at 1115 (*citing Armstrong v. Kline*, 476 F.Supp 583, 601 (E.D.Pa. 1979), and *Monahan v. State of Nebraska*, 645 F.2d 592, 597 (8th Cir. 1981)). Similarly, the

Tenth Circuit holds that exhaustion of remedies is generally "inadequate or futile" where plaintiffs allege structural or systematic failure *or* where plaintiffs assert violations of the IDEA's due process provisions. *Ass'n for Community Living v. Romer*, 992 F.2d 1040, 1044 (10th Cir. 1993).

Exhaustion of remedies in the present case would have been futile and inadequate. First, the APSS failed to comply with the due process provisions of the IDEA and failed to take any notice-triggering action. *See*, *Rochester City Sch. Dist.*, *supra*; and *Romer*, *supra*. As a result, the administrative remedies under the IDEA were not *available* to Hall.

Second, even assuming *arguendo* that the APSS adequately informed Hall of his rights and remedies pursuant to Section 1415 of the IDEA, at the point in time when Hall received the letter of February 7, 1995, he was no longer attending Southside High School. Any administrative redress under the IDEA, consequently, would be pointless.

Even if Hall were still attending Southside, administrative appeal at this point still would be futile.[5] The letter was furnished in the *final*-semester of what would have been Hall's senior year, almost four (4) years after Hall first asked to become a member of the Southside Track Team. Even if Hall had appealed this decision and prevailed, by the time he had exhausted State administrative procedures his last track season of his high school career would have passed anyway.

Furthermore, at the time Hall received the letter of February 7, 1995, Hall's only available remedy was money damages because he was no longer attending Southside High School. The IDEA makes no mention of money damages as a remedy. At least one Circuit has held that where the only relief

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[5] The Eleventh Circuit maintains that Hall has not argued that an administrative hearing would have been futile or inadequate. (*See*, Appendix B). Hall respectfully disagrees. Hall did in fact argue that exhaustion of remedies would be futile at pages 8 and 29 of Appellant's Brief, submitted to the Eleventh Circuit.

available is monetary damages, the plaintiff is not required to exhaust administrative remedies under the IDEA, because such proceedings would be futile. *W.B. v. Matula*, 67 F.3d 484, 496 (3rd Cir. 1995). There was nothing to be gained for Hall by pursuing administrative remedies after he had finished high school.

Accordingly, the Eleventh Circuit erred when it held that Hall should have exhausted his administrative remedies, because exhaustion of administrative remedies would have been futile and inadequate.

IV. THE COURT ERRED WHEN IT PLACED THE BURDEN OF SAFEGUARDING HALL'S RIGHTS UNDER THE IDEA ON HALL

The burden of safeguarding Hall's rights under the IDEA rested squarely upon the APSS, not upon Hall. See *Jackson v. Franklin County Sch. Bd.*, 805 F.2d 623,629 (5th Cir. 1986) (citing *S-1 v. Turlington*, 635 F.2d 342, 349 (5th Cir. 1981)). However, the Eleventh Circuit erroneously placed that burden on Hall by concluding that it was Hall who waited three years before formally requesting remedy from the School Board. (See pp. a-5 and a-10).

The Eleventh Circuit maintained that it was "Hall's decision to wait three years to formally complain and then leave school while the School District reviewed the Complaint." (See p. a-5).

In fact, Hall did complain numerous times. He complained to three of his coaches, the Director of Athletics for Southside, and the Assistant Director of Athletics for the APSS, and the OEEO. It was the APSS, not Hall, who waited three years, until it was too late, to take any action. Accordingly, it was the APSS' own dilatory tactics which rendered administrative review futile and inadequate. In spite of the inadequacy and unavailability of administrative review in this case, the Eleventh Circuit concluded that Hall was required to exhaust administrative processes.

Hall was unaware of the administrative procedures under the IDEA because the APSS failed to discharge its burden of safeguarding Hall's rights under the IDEA by notifying Hall of those rights at a time when Hall could take advantage of the administrative remedies under the IDEA. By the time the APSS did render a decision it was too late for Hall to avail himself of the procedural protections of the IDEA. Even when the APSS did render a decision in its letter of February 7, 1995, the APSS still failed to inform Hall and his mother that they had administrative remedies available to them under the IDEA. Obviously, the APSS failed miserably in its duty to safeguard Hall's rights under the IDEA. Notwithstanding this fact, the Eleventh Circuit placed the blame for Hall's failure to exhaust his administrative remedies on Hall rather than on the APSS. Accordingly, the Eleventh Circuit erred in affirming the District Court's decision to dismiss Hall's Complaint.

CONCLUSION

For all of the foregoing reasons, Hall respectfully requests that this Court grant his Petition for Writ of Certiorari.

Respectfully submitted,

Michael Weinstock
Counsel of Record
Louis R. Cohan
Catherine M. Banich
WEINSTOCK & SCAVO, P.C.
Suite 300
3405 Piedmont Road, N.E.
Atlanta, Georgia 30305
(404) 231-3999

Dated: September 26, 1997

APPENDIX A - Judgment of the United States Court of Appeals for the Eleventh Circuit Entered on April 11, 1997

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-8837
Non-Argument Calendar

D. C. Docket No. 1:95-CV-3307

DeCHARLEUNO J. HALL,
Plaintiff-Appellant,

versus

ATLANTA PUBLIC SCHOOL SYSTEM,
Defendant-Appellee.

On Appeal from the United States District Court for the
Northern District of Georgia

Before: HATCHETT, Chief Judge, BIRCH and CARNES, Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be and the same is hereby AFFIRMED;

It is further ordered that plaintiff-appellant pay defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

Entered: April 11, 1997

For the Court: Miguel J. Cortez, Clerk

By: /s/_____
Deputy Clerk

ISSUED AS MANDATE: 7/10/97 ORD-41

APPENDIX B - Opinion of the United States Court of Appeals for the Eleventh Circuit Entered on April 11, 1997

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-8837
Non-Argument Calendar

D. C. Docket No. 1:95-CV-3307-ODE

DeCHARLEUNO J. HALL,
Plaintiff-Appellant,

Versus

ATLANTA PUBLIC SCHOOL SYSTEM,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

(April 11, 1997)

Before: HATCHETT, Chief Judge, BIRCH and CARNES, Circuit Judges.

PER CURIAM:

Appellant DeCharleuno J. Hall challenges the order from the United States District Court for the Northern District of Georgia dismissing Hall's complaint. Hall filed the underlying action pursuant to the Americans with Disabilities Act, 42 U.S.C. § 12132 *et seq.*. (ADA), the Rehabilitation Act of 1973, 29 U.S.C. § 794 *et seq.*, and 42 U.S.C. § 1983. The complaint alleged that the defendant-appellee Atlanta Public School System (APSS) discriminated against Hall,

who is "functionally blind," by preventing Hall from competing as a member of the Southside High School track team. The district court dismissed the complaint based on its determination that Hall failed to exhaust his administrative remedies as required by the Individuals with Disabilities Education Act (IDEA), 20 U.S.C.,1401 § *et seq*. We hold that the district court did not abuse its discretion in its finding that Hall did not properly exhaust his administrative remedies, and we affirm the dismissal of Hall's complaint.

This court reviews the district court's decision for an abuse of discretion. *Ass'n for Retarded Citizens of Ala., Inc. v. Teague*, 830 F.2d 158, 161 (11th Cir. 1987). Both parties agree that the provisions of the IDEA apply to any action that seeks relief available under the IDEA. 20 U.S.C. § 1415(f) (1994); *see, e.g., Charlie F. v. Bd. of Educ. of Skokie Sch. Dist. 68*, 98 F.3d 989, 992 (7th Cir. 1996) (plaintiff must exhaust administrative remedies when filing for damages pursuant to the ADA, the Rehabilitation Act and § 1983); *see also N.B. v. Alachua County Sch. Bd.*, 84 F.3d 1376 (11th Cir. 1996), *cert. denied*, --S. Ct.-- (1997). Hall further concedes that the IDEA requires that a plaintiff participate in an administrative hearing prior to filing an action in state or federal court. 20 U.S.C. § 1415(e)(2) (1994). Hall contends, however, that the court should have excused his failure to obtain a hearing prior to filing this action because (1) the APSS's dilatory tactics caused his breach of the IDEA provisions, and (2) the APSS failed to provide Hall with notice as required by the IDEA. Hall also argues that the district court erroneously charged him with the burden to seek redress pursuant to the IDEA.

The district court's opinion does not evidence an abuse of discretion. Hall first attempted to joint the track team as a high school freshman in 1991. Neither he nor his parents, however, filed a complaint with the school district until June 30, 1994, after his junior year ended and only months before

he chose not to return to Southside.[6] Although Hall contends that the school district failed to provide him with a definitive answer to his requests to join the track team, this lack of notice did not preclude Hall's mother from filing the June 1994 complaint. Following this complaint, the school district ordered an eye examination, reviewed Hall's medical records, and refused his request to participate. The school district's letter to Hall, dated February 7, 1995, gave him adequate notice of his rights pursuant to the IDEA. Instead of seeking a hearing, Hall chose to file this lawsuit. Hall therefore failed to exhaust his administrative remedies pursuant to the IDEA, and the district court properly placed the burden on Hall to justify this failure.

We hold that Hall did not fulfill the administrative requirements of the IDEA and should not be excused from compliance therewith. We therefore affirm the district court's order dismissing the complaint.

AFFIRMED

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[6]Although Hall does not argue that an administrative hearing would have been futile or inadequate, this court's decision in *Teague* excuses the exhaustion reequirement for such reasons. Under the facts at issue, such an argument would be pointless, however, because it was Hall's decision to wait three years to formally complain and then leave school while the school district reviewed the complaint.

APPENDIX C - Order of United States District Court for the Northern District of Georgia, Entered on May 2, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION
FILE NO. 1:95-CV-3307-ODE

DeCHARLEUNO J. HALL,

Plaintiff,

v.

ATLANTA PUBLIC SCHOOL SYSTEM,

Defendant.

ORDER

This civil case is before the court on Defendant's motion to dismiss. Plaintiff has filed a response.

Plaintiff, who is functionally blind,[7] brings this suit under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §1983. Plaintiff seeks actual, compensatory and punitive damages based on his allegations that he was discriminated against on the basis of his handicap during the school years of 1991-92, 1992-93 and 1993-94 at Southside High School in Atlanta, Georgia. Specifically, Plaintiff alleges that he sought to participate in his high school's track team and was

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[7] Plaintiff perceives some light in his right eye. (Complaint at ¶17). Mark Kranz, M.D., who conducted a medical assessment of Plaintiff on behalf of Atlanta Public Schools in 1994, determined that Plaintiff was functionally blind. (Complaint at ¶33; Ex. A Attached to Def.'s Reply Brief in Supp. of Mot. to Dismiss).

wrongfully disallowed. Defendant moves for dismissal on the basis that Plaintiff could and should have brought his claims under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §1400 *et seq.* Accordingly, contends Defendant, Plaintiff's action must be dismissed for failure to exhaust administrative remedies as required by the IDEA. In support of its contention, Defendant cites 20 U.S.C. §1415(f), which provides:

> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973 [29 U.S.C.A. §790 et seq.], or other Federal statutes protecting the rights of handicapped children and youth, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (b)(2) and (c) of this section shall be exhausted to the same extent as would be required had the action been brought under this chapter.

Subsections (b)(2) and (c) provide for a due process hearing to be conducted by a state, local or intermediate educational agency. Defendant contends that exhaustion of administrative remedies is required by the IDEA even when, as in the instant case, Plaintiff seeks monetary damages which are available under other federal statutes but not under the IDEA. *See Doe v. Alfred*, 906 F.Supp. 1092 (S.D. W.Va. 1995); *Waterman v. Marquette-Alger Intermediate Sch. Dist.*, 739 F.Supp. 361 (W.D. Mich 1990).

A complaint may not be dismissed under Fed. R. Civ. P. 12(b)(6) 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Rosen v. TRW, Inc.*, 979 F.2d 191, 194 (11th Cir. 1992) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). "All well-pleaded facts in plaintiff['s] complaint and all reasonable inferences drawn from those facts are taken as true." *Oladeinde v. City of Birmingham*, 963 F.2d 1481, 1485 (11th

Cir. 1992) (citation omitted), *cert. denied*, ____ U.S. ___, 123 L. Ed. 2d 153 (1993). Accordingly, the court treats the assertions made in Plaintiff's complaint as true.[8]

Plaintiff disputes neither Defendant's contention that the IDEA encompasses claims such as his, nor Defendant's contention that the IDEA requires exhaustion of remedies. Instead, Plaintiff contends that his failure to exhaust administrative remedies is properly excused because Defendant failed to notify him or his mother of his right to a due process hearing. Moreover, Plaintiff alleges that he is properly relieved of the duty to exhaust administrative remedies because for three years school employees "strung him along," never giving him a definite answer to his request to participate on the track team. Plaintiff bases his argument on the requirement of 20 U.S.C. §1415(b)(a)(C) that

> written prior notice to the parents or guardian of the child [is required] whenever [a State, local or intermediate educational] agency or unit (i) proposes to initiate or change, or (ii) refuses to initiate or change, the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child

Plaintiff alleges that the track coaches and athletic director at Southside High used dilatory tactics in ignoring his requests to participate on the track team, avoiding for three academic years the necessity of clearly denying or granting his request. Plaintiff states that in 1994 he spoke with the assistant athletic director for the Atlanta Public School System, Walter Wade, who assured Plaintiff that he would assist in Plaintiff's

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[8] The court notes that Plaintiff did not clearly allege facts in his complaint which expressly support his contention that his failure to exhaust administrative remedies should be excused. Plaintiff clearly raised such an argument only in his response to Defendant's motion to dismiss. Nevertheless, making all possible inferences in Plaintiff's favor, and giving Plaintiff the benefit of the doubt in all factual disputes, the court will consider all arguments raised in Plaintiff's response.

endeavor to become a member of the Southside track team. Plaintiff never took part in a high school track meet, however. Finally, alleges Plaintiff, in April 1994 his mother telephoned the Office of Equal Educational Opportunities and was assured by coordinator Renee Ivey that the matter would be reviewed. Plaintiff states that no action was taken on his behalf, so his mother filed on June 30, 1994 (at the end of his junior year) a formal complaint with the Atlanta Public School System. Plaintiff alleges he was so disheartened and humiliated by the occurrences of the previous three years that he could not return to Southside High for his senior year. Instead, he took and passed a high school equivalency examination. Thereafter, on June 19, 1995, he filed a complaint with the office of Civil Rights of the United States Department of Education. He instigated the instant lawsuit on December 20, 1995.

Defendant submitted as an attachment to its reply brief a copy of a letter dated February 7, 1995 to Plaintiff's mother from Renee Ivey, Coordinator, Office of Equal Educational Opportunities, Atlanta Public Schools. The letter states that a hearing was conducted on February 7, 1995, during which it was determined that the risk of injury to Plaintiff and to other students outweighed Plaintiff's desire to run track. The letter expressly informed Plaintiff's mother that she

> should be aware that [she] has a right to appeal the decision made today regarding [Plaintiff's] request to run on the Southside High School track team. That appeal should be directed to Dr. Benjamin O. Canada, Superintendent. Specifically, you should ask that a due process hearing be conducted in response to the decision made.

The court finds unavailing Plaintiff's argument that his failure to exhaust administrative remedies was caused by Defendant. Plaintiff, no longer a student at Southside High, alleges that he attempted to become part of the track team for three years but was wrongfully denied the opportunity through opaque delay tactics employed by school system employees and

officers. Yet, when Plaintiff's mother finally filed a complaint with the school system, it appears that the school system obtained a medical examination of Plaintiff and issued a denial of Plaintiff's request along with notice that a due process hearing could be requested. Plaintiff faults the school system for its "failure to notify Jay [Plaintiff] of his procedural remedies under the IDEA, as it is required to do under Section 1415, . . . prevent[ing] Jay from exhausting those remedies." (Pl.'s Resp. to Motion to Dismiss at 14). It appears, however, that the school system did notify Plaintiff of his right to appeal. Defendant did not prevent Plaintiff from pursuing administrative remedies. Instead, Plaintiff himself was dilatory in waiting three years before formally requesting remedy from the school board. When his mother filed a complaint with the school board, her son was no longer a student in an Atlanta public school. Moreover, Plaintiff apparently employed Weinstock & Scavo, P.C. as counsel prior to his June 19, 1995 filing of a complaint with the Office of Civil Rights, and prior to his filing of the instant lawsuit. (*See* Ex. A Attached to Pl.'s Resp. to Mot. to Dismiss). Plaintiff certainly is now aware of the requirement of exhaustion, and his awareness can be inferred at the time that counsel was employed. *See Waterman v. Marquette-Alger intermediate Sch. Dist.*, 739 F.Supp 361 (W.D. Mich.1990). Plaintiff has failed to pursue administrative recourse adequately.

The court agrees with Defendant that Plaintiff's present pursuit of remedy in this court, four years after the time that Plaintiff alleges discrimination began, and without fulfilling the statutory requirement of exhausting administrative remedies, is unreasonable. Plaintiff has not alleged circumstances which warrant excusal of his failure to exhaust administrative remedies; equity would not be served by excusing such failure.

Accordingly, Defendant's motion to dismiss (#3-1] is GRANTED.

SO ORDERED, this 1 day of May, 1996.

/s/

ORINDA D. EVANS
UNITED STATES DISTRICT
JUDGE

APPENDIX D - Judgment of the United States District Court for the Northern District of Georgia, Entered on May 2, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION
FILE NO. 1:95-CV-3307-ODE

DeCHARLEUNO J. HALL,

Plaintiff.

v.

ATLANTA PUBLIC SCHOOL SYSTEM,

Defendant.

JUDGMENT

This action having come before the court, Orinda D. Evans, United States District Judge, for consideration of defendant's motion to dismiss, and the court having granted same, it is **Ordered and Adjudged** that the plaintiff, Decharleuno J. Hall, take nothing, that the action is dismissed, and that the defendant, Atlanta Public School System, recover from plaintiff the costs of this action.

Dated at Atlanta, Georgia, this 2nd day of May, 1996.

Luther D. Thomas, Clerk

By:/s/_____
Deputy Clerk
Prepared, Filed, and Entered
in the Clerk's Office
May 2, 1996
Luther D. Thomas, Clerk

By: /s/
Deputy Clerk

APPENDIX E - Order of the United States District Court for the Northern District of Georgia, Entered on June 12, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION
FILE NO. 1:95-CV-3307-ODE

DeCHARLEUNO J. HALL,

Plaintiff,

v.

ATLANTA PUBLIC SCHOOL SYSTEM,

Defendant.

ORDER

This civil action brought under the Americans with Disabilities Act, 42 U.S.C. § 12131 *et seq.*, the Rehabilitation Act of 1973, 29 U.S.C. § 794 *et seq.*, and 42 U.S.C. § 1983, is before the court on Plaintiff's motion to reconsider this court's May 2, 1996 order granting Defendant's motion to dismiss. Defendant has filed a response in opposition to Plaintiff's motion.

There are three primary grounds for reconsideration of a judgment: an intervening change in controlling law, the availability of new evidence, and the need to correct clear error or prevent manifest injustice. *Estate of Pidcock v. Sunnyland America, Inc.*, 726 F. Supp. 1322, 1333 (S.D. Ga. 1989); *see also Harsco Corp. v. Zlotnicki*, 779 F 2d 906, 909 (3rd Cir. 1985)), *cert. denied*, 476 U.S. 1171 (1986). The court finds that none of these grounds is present in the instant case such that reconsideration is warranted.

Accordingly, Plaintiff's motion to reconsider [11-1] is DENIED.

so ordered, THIS *12* day of June, 1996.

/s/
ORINDA D. EVANS
UNITED STATES DISTRICT
JUDGE

APPENDIX F - Order of the United States Court of Appeals for the Eleventh Circuit Entered on July 1, 1997

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-8837

DeCHARLEUNO J. HALL,
Plaintiff-Appellant,

Versus

ATLANTA PUBLIC SCHOOL SYSTEM,
Defendant-Appellee.

On Appeal from the United States District Court for the Northern District of Georgia

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Before: HATCHETT, Chief Judge, BIRCH and CARNES, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing filed by the Appellant, DeCharleuno J. Hall, is denied.

ENTERED FOR THE COURT:

/s/
UNITED STATES CIRCUIT JUDGE

ORD-41

APPENDIX G - Order of the United States Court of Appeals for the Eleventh Circuit Entered on July 1, 1997

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-8837
Non-Argument Calendar

D. C. Docket No. 1:95-CV-3307

DeCHARLEUNO J. HALL,
Plaintiff-Appellant,

Versus

ATLANTA PUBLIC SCHOOL SYSTEM,
Defendant-Appellee.

On Appeal from the United States District Court for the
Northern District of Georgia

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC (Opinion _____, 11th Cir. 19____, _____ F.2d____)

Before: HATCHETT, Chief Judge, BIRCH and CARNES, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate

Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/
UNITED STATES CIRCUIT JUDGE

ORD-42
(6/95)

APPENDIX H- Section 1415 of the Individuals With Disabilities Education Act

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§ 1415. Procedural safeguards

(a) Establishment and maintenance. Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this part shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that children with disabilities and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

(b) Required procedures; hearing. (1) The procedures required by this section shall include, but shall not be limited to -

(A) an opportunity for the parents or guardian of a child with a disability to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian;

(C) written prior notice to the parents or guardian of the child whenever such agency or unit -

(i) proposes to initiate or change, or

(ii) refuses to initiate or change,

the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully informs the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

(c) Review of local decision by State educational agency. If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

(d) Enumeration of rights accorded parties to hearings. Any party to any hearing conducted pursuant to subsections (b) and (c) shall be accorded (1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities, (2) the right to present evidence and confront, cross-

examine, and compel the attendance of witnesses, (3) the right to a written or electronic verbatim record of such hearing, and (4) the right to written findings of fact and decisions (which findings and decisions shall also be transmitted to the public consistent with the requirements of Section 617(c) and shall also be transmitted to the advisory panel established pursuant to section 613(a)(12)[20 USCS § 1413(a)(12)]).

(e) Civil action; jurisdiction. (1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) who does not have the right to an appeal under subsection (c), and any party aggrieved by the findings and decision under subsection (c), and any party aggrieved by the findings and decision under subsection (c), shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) (A) Except as provided in subparagraph (B), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

(B)(i)Except as provided in clause (iii), if the proceedings conducted pursuant to this section involve a child with a disability who is determined to have brought a weapon to school under the jurisdiction of such agency, then the child may be placed in an interim alternative educational setting, in accordance with State law, for not more than 45 days.

(ii) The interim alternative educational setting described in clause (i) shall be decided by the individuals described in section 602(a)(20) [20 USCS § 1401(a)(20)].

(iii) If a parent or guardian of a child described in clause (i) requests a due process hearing pursuant to paragraph (2) of subsection (b), then the child shall remain in the alternative educational setting described in such clause during the pendency of any proceedings conducted pursuant to this section, unless the parents and the local educational agency agree otherwise.

(iv) For the purpose of this section, the term "weapon" means a firearm as such term is defined in section 921 of title 18, United States Code.

(4) (A) The district courts of the united States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

(B) In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a youth with a disability who is the prevailing party.

(C) For the purpose of this subsection, fees awarded under this subsection shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.

(D) No award of attorneys' fees and related costs may be made in any action or proceeding under this subsection for services performed subsequent to the time of a written offer of settlement to a parent or guardian, if

> (i) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure [USCS Federal Rules of Civil Procedure, Rule 68] or, in the case of an administrative proceeding, at any time more than ten days before the proceeding begins;
>
> (ii) the offer is not accepted within ten days; and
>
> (iii) the court or administrative officer finds that the relief finally obtained by the parents or guardian is not more favorable to the parents or guardian than the offer of settlement.

(E) Notwithstanding the provisions of subparagraph (D), an award of attorneys' fees and related costs may be made to a parent or guardian who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(F) Whenever the court finds that -

> (i) the parent or guardian, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;
>
> (ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the

community for similar services by attorneys of reasonably comparable skill, experience, and reputation; or

(iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding,

the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this subsection.

(G) The provisions of subparagraph (F) shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of section 615 of this Act [this section].

(f) Effect on other laws. Nothing in this title shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973 [29 USCS §§ 790 et seq.], or other Federal statutes protecting the rights of handicapped children and youth, except that before the filing of a civil action under such laws seeking relief that is also available under this part, the procedures under the subsections (b)(2) and (c) shall be exhausted to the same extent as would be required had the action been brought under this part.

APPENDIX I –Letter from The Atlanta Public School System to Vonnie Hall dated February 7, 1995

ATLANTA PUBLIC SCHOOLS

Instructional Services Center
2930 Forrest Hill Drive, S.W.
Atlanta, Georgia 30315

Office of
Equal Educational
Opportunities

February 7, 1995

Ms. Vonnie Hall
141 Hilliard Street, S.E., Apt. 214
Atlanta, Georgia 30312

Dear Ms. Hall:

I am sorry that you were unable to attend the meeting that was held today to discuss medical information received from Dr. Marc Kranz relative to you son's [DeCharleuno (D.J.) Hall] request to be allowed to participate in track and field activities at Southside High School. Mr. Shepherd, Mr. Reeves, Mr. Tookes, Ms. Manley, Mr. Campbell and I did conduct the meeting in your absence, however. This communication provides you with a summary of the comments shared during that meeting.

Dr. Kranz submitted a medical assessment of your son's visual abilities to me on January 31, 1995. As you are aware, the Atlanta Public School System authorized and paid for the conduct of this assessment in order to assist us in determining whether D.J. was a qualified individual with a disability under Section 504 and which, if any reasonable accommodations

might be provided to afford him an equal opportunity to participate in track and field activities at the school.

Dr. Kranz has determined that D.J. is functionally blind. He has noted that D.J. is able to detect light in his right eye and he notices hand motion at only one inch from his left eye. Essentially, D.J.'s left eye is blind. Dr. Kranz has also indicated that, given D.J.'s visual acuity, it is quite a remote possibility that he would be able to safely run track without hurting himself or other trackers. Given that medical assessment, the individuals who participated in today's meeting, with the exception of Mr. Tookes, felt that the risk of injury outweighed D.J.'s desire to run track. Also, Section 504 requires that a disabled person meet the requisite skill base for the program that he or she wishes to participate in. Based on Dr. Kranz's assessment, it does not appear that D.J. meets the requisite criteria for a student participant on a track team. Also, Section 504 does not require school systems to provide accommodations when it can be shown that to do so would result in direct threat of harm to the disabled person or to others.

During our meeting, Mr. Tookes informed us that he had spoken with D.J. last night and that he (D.J.) was aware of today's meeting. Mr. Tookes said that D.J. said that he did not intend to run track this year because he (D.J.) is suppose to become a member of an independent track team. We also learned that D.J. was not attending classes at Southside High School although he is still on the roll. Rather, D.J. attends the Sensory Center form 8:30 a.m. until 3:30 p.m. daily because he has completed his course work at Southside. Mr. Tookes stated that D.J. has been accepted at Garner Webb School in North Carolina. That was really nice to hear.

Coach Price also discussed the sensitivity training session that I presented to all general coaches earlier in the school year. He suggested that I expand that training to all athletic personnel and to all individuals who sponsor any activities in the schools.

I hope that you will telephone me at 827-8702 if you have questions. You should know that you have a right to appeal the decision made today regarding D.J.'s request to run on the Southside High School track team. That appeal should be directed to Dr. Benjamin O. Canada, Superintendent. Specifically, you should ask that a due process hearing be conducted in response to the decision made. It will be necessary for you to detail the actions that have been taken to date, although Dr. Canada is familiar with this case.

Cordially,

Renee N. Ivey, Coordinator
Office of Equal Educational opportunities

RNI: bw

Cc: Mr. William Shepherd

(2)

Supreme Court, U.S.
FILED
OCT 29 1997
CLERK

No. 97-553

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

DECHARLEUNO J. HALL,
Petitioner,

v.

ATLANTA PUBLIC SCHOOL SYSTEM,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

AMY TOTENBERG, ESQ.
Counsel of Record
210 Pryor Street
Atlanta, Georgia 30335
(404)827-8959

CHARLES L. WEATHERLY, ESQ.
THE WEATHERLY LAW FIRM
3414 Peachtree Road, NE
Suite 450
Atlanta, Georgia 30326
(404)262-9500

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STATEMENT OF THE CASE

Nature of the Case

Notwithstanding the position of Petitioner, this is a very simple case and is not one for which a writ should be issued. This is a case that should have been brought under the Individuals with Disabilities Education Act ("IDEA") but was brought under Section 504 of the Rehabilitation Act of 1973 ("Section 504"), the Americans with Disabilities Act ("ADA") and 42 U.S.C. § 1983 ("Section 1983"). As a result, the Eleventh Circuit upheld the District Court's dismissal of Petitioner's Complaint because he did not properly exhaust administrative remedies pursuant to IDEA prior to bringing his action.

Statement of Facts

For obvious reasons, Respondent has not taken the opportunity to assert its denials or defenses in this case, as it moved to dismiss the action based upon a clear principle of law. In response, Petitioner has continued to assert facts that were not properly sworn or pled in his Complaint. Specifically, Petitioner asserts that he was not notified of a "decision" that he could not run track at Southside and that neither he nor his mother were informed that they had the right to complain. In addition, Petitioner waited until briefing before this Court to argue that exhaustion of administrative remedies would be futile and even then offered no evidentiary support for this assertion.[1] (Petition, page 15).

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[1] The Eleventh Circuit noted that even had Petitioner argued that exhaustion would have been futile or inadequate, the argument would have been pointless since Petitioner made the decision to wait three years to formally complain and then left school while the School System reviewed the complaint. (Petition, App. B, a-5).

Petitioner has never disputed that his claims could have and should have been brought under IDEA and that the law clearly requires exhaustion of administrative remedies. Indeed, Petitioner pled in his original Complaint that he had "satisfied any and all conditions precedent to the filing of this action...." (R1-1-12, 13).

It is also important that Petitioner's Complaint clearly indicated that during the 1991-92, 1992-93 and 1993-94 school years, he "continually sought but was repeatedly refused the opportunity to become a member of the Southside track team." (R1-1-8). In light of this statement, Petitioner's assertion that he was not provided "notice" until February 1995 of being denied the opportunity to compete on the Southside track team is without merit. This is so, especially in light of the fact that Petitioner's mother formally complained to Respondent's Office of Equal Educational Opportunities ("OEEO") on June 30, 1994. (R1-9-4).

It is clear that Petitioner's mother knew that he was not running track and that she should complain in 1994. After she complained, Respondent's OEEO Coordinator, Ms. Reanee Ivey, wrote to Petitioner's mother in February 1995 that, based upon a medical examination and additional considerations, the risk of injury to Petitioner and to other students outweighed his desire to run track. In addition, the letter expressly informed Petitioner's mother that she had the right to appeal the decision and that she "should ask that a due process hearing be conducted in response to the decision made." (R1-9-5; Petition, App. I, a-27).

Instead of initiating a due process hearing, Petitioner employed legal counsel and filed a complaint with the Office for Civil Rights on June 19, 1995. (R1-9-6). In addition, he initiated an action in district court for money damages on December 20, 1995.

The Eleventh Circuit affirmed the district court's dismissal of Petitioner's case on the basis that he first attempted to join the track team in 1991 but did not complain about the denial of the opportunity to do so until June 30, 1994, after his junior year ended and only months before he chose not to return to Southside. Further, the Eleventh Circuit found that, although Petitioner contended that Respondent failed to provide him with a definitive answer to his requests to join the track team, this lack of notice had not precluded Petitioner's mother from lodging a complaint in June of 1994.

The Eleventh Circuit noted that in response to the June 1994 complaint, Respondent ordered an eye examination of Petitioner, reviewed Petitioner's medical records and refused his request to participate. In addition, the Eleventh Circuit found that Respondent's letter of February 7, 1995 gave adequate notice of the right to ask for a hearing pursuant to IDEA. Because the right was not exercised, the Eleventh Circuit concluded that Petitioner failed to exhaust IDEA's administrative remedies and that the district court properly placed the burden on Petitioner to justify the failure.

Contrary to Petitioner's arguments, the Eleventh Circuit's decision does not depart, in any way, from the provisions of IDEA, from the decisional law of another United States court of appeals or from its own precedent. Accordingly, the Petition for Writ of Certiorari should be denied.

REASONS FOR DENYING THE WRIT

I. THE ELEVENTH CIRCUIT'S DECISION DOES NOT DEPART FROM THE PROVISIONS OF IDEA, FROM THE DECISIONAL LAW OF OTHER COURTS OF APPEAL OR FROM ITS OWN PRECEDENT.

A. The Clear Language of IDEA and its Regulations Requires Exhaustion in this Case.

The Individuals with Disabilities Education Act provides public school agencies with federal assistance for the education of students with disabilities. To implement IDEA, the United States Department of Education has promulgated regulations that, in addition to requiring appropriate educational instruction to students with disabilities, contain provisions with respect to nonacademic and extracurricular activities. For example, the regulations require public agencies to "take steps to provide nonacademic and extracurricular services and activities in such manner as is necessary to afford children with disabilities an equal opportunity for participation...." 34 C.F.R. § 300.306(a).

In addition to its substantive provisions, IDEA contains an array of procedural safeguards that must be made available to students with disabilities and their parents.[2] Included among these safeguards is the opportunity for parents to "present complaints with respect to any matter relating to the identification, evaluation or educational placement of the child, or the provision of a free appropriate public education...." 20 U.S.C. § 1415(b)(6). Whenever a complaint

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[2] Respondent notes that IDEA was significantly amended on June 4, 1997 and that Appendix H to the Petition contains the language of the former statute.

has been received, the parents "shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency...." 20 U.S.C. § 1415(f)(1).

Any party aggrieved by the findings and a final decision made by a hearing officer "shall have the right to bring a civil action with respect to the complaint" in any State court of competent jurisdiction or in a district court. 20 U.S.C. § 1415(i)(2)(A). The court is required to receive the records of the administrative proceedings, hear additional evidence at the request of a party and "grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(B).

With regard to its effect upon actions brought under other statutes, IDEA provides that it is not to be construed to restrict or limit the rights, procedures and remedies available under the Constitution, the Americans with Disabilities Act of 1990, Title V of the Rehabilitation Act of 1973 or other Federal laws protecting the rights of children with disabilities. 20 U.S.C. § 1415(l). However, the Act is clear that "before the filing of a civil action under such laws seeking relief that is also available under [IDEA]," the due process procedures under IDEA shall be exhausted to the same extent as would be required had the action been brought under IDEA.[3] *Id.*

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[3] Again, it is pertinent that Petitioner has never disputed that his case could have and should have been brought under IDEA and that the law clearly requires exhaustion of administrative remedies. Rather, it has always been his position that it is the fault of Respondent that he did not exhaust such remedies.

B. Respondent Provided and Petitioner Had Sufficient Notice of the Right to Initiate a Due Process Hearing.

Respondent does not dispute the importance of IDEA's procedural safeguards. However, the Eleventh Circuit correctly found that the opportunity for a due process hearing and sufficient notice of that right were given to Petitioner in February of 1995, such that exhaustion of administrative remedies would be required in this case.[4]

Even assuming *arguendo* that Respondent's February 1995 letter did not constitute adequate notice of the right to initiate a due process hearing, the necessity for Petitioner to exhaust would not be eliminated. At the very least, Petitioner should have been made aware of the exhaustion requirement when he hired legal counsel in June of 1995.

Under IDEA, the Eleventh Circuit has held that technical procedural violations, such as the failure to provide written notice, will serve as the basis for relief *only* where the procedural violation is shown to have harmed the student or parents. *Doe v. Alabama State Dept. of Educ.*, 915 F.2d 651 (11th Cir. 1990). In *Doe,* the Eleventh Circuit held that, while there may have been deficiencies with regard to the provision of written notice to the parents, such deficiencies had no impact upon them or the student and, therefore, could not serve as a basis for relief to the parents. Other circuits have agreed. *See Chuhran v. Walled Lake Consolidated Schs.*, 51 F.3d 271 (6th Cir. 1995); *Weil v. Bd. of Elementary &*

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[4] To the extent that Petitioner argues that the notice of the right to a hearing did not specify the hearing as an "IDEA hearing," the Act does not require a school agency to designate the hearing as such. Thus, Petitioner's argument based upon the fact that Ms. Ivey's letter did not specify the right to an "IDEA hearing" is unpersuasive.

Secondary Educ., 931 F.2d 1069 (5th Cir.), *cert. denied*, 112 S. Ct. 306 (1991); *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973 (4th Cir. 1990); *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983 (1st Cir. 1990); *Leonard v. McKenzie*, 869 F.2d 1558 (D.C. Cir. 1989); and *Evans v. Sch. Dist. No. 17 of Douglas County*, 841 F.2d 824 (8th Cir. 1988).

At least by February of 1995, Petitioner's mother was made aware of the right to initiate a due process hearing. Additionally, Petitioner and his counsel have known since June 1995 that he had the right to and was required to initiate a due process hearing to address his claims. Thus, sufficient notice was provided to trigger the requirement for the exhaustion of administrative remedies in this case.

II. THE ELEVENTH CIRCUIT WAS CORRECT IN REFUSING TO RELIEVE PETITIONER OF HIS OBLIGATION TO EXHAUST ADMINISTRATIVE REMEDIES.

Petitioner argues that Respondent is to blame for his failure to exhaust and that, therefore, he should be excused for such failure. Obviously, Petitioner's argument is based upon the incorrect premise that sufficient opportunity was not provided to him for a due process hearing. However, even were Petitioner's premise correct, the Eleventh Circuit's decision requiring exhaustion would remain valid and does not depart from decisions of other courts of appeal.

In support of his position, Petitioner relies upon the Second Circuit's decision in *J.G. v. Rochester City Sch. Dist.*, 830 F.2d 444 (2d Cir. 1987). However, *J.G.* is not in conflict with the Eleventh Circuit's holding. Rather, the Second Circuit found that exhaustion was excused because the plaintiff's claim was that the school district *systematically* did not inform parents of the right to present complaints and to

initiate impartial hearings and how to obtain them. Such was not the case here.[5]

Petitioner's reliance upon two decisions from the Fifth Circuit is also misplaced. In relying upon the Texas district court opinion of *Ruth Anne M. v. Alvin Independent Sch. Dist.*, 532 F. Supp. 460 (S.D. Tex. 1982), Petitioner fails to discuss *all* of the court's language with regard to excusable failure to exhaust. Although the court found that plaintiffs were not notified of their administrative rights under the Act and that the school district had not taken notice-triggering action, the court observed that "[n]or have defendants established that plaintiffs otherwise knew or should have known of the availability of administrative recourse...." 532 F. Supp. at 463. The Eleventh Circuit found, in the instant case, that Petitioner knew or should have known of the availability of an administrative hearing.

Petitioner's reliance upon the Fifth Circuit's decision in *Jackson v. Franklin County Sch. Bd.*, 806 F.2d 623 (5th Cir. 1986) is also misplaced. Quite simply, the Fifth Circuit did not address the issue of exhaustion of administrative remedies for claims covered by IDEA in *Jackson*.

III. PETITIONER DID NOT ARGUE BELOW THAT EXHAUSTION WOULD HAVE BEEN FUTILE.

Petitioner has waited until now to assert that exhaustion would have been futile in this case. As was noted by the Eleventh Circuit, even had he made such an argument, it

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[5] The Second Circuit's opinion in *Quackenbush v. Johnson City Sch. Dist.*, 716 F.2d 141 (2d Cir. 1983) is also immaterial to the Eleventh Circuit's opinion in this case. There, the court allowed an action for damages to proceed in the absence of exhaustion because the school district specifically denied a parental request for a due process hearing.

would have been "pointless," since Petitioner waited three years to formally complain and then left school. (Petition, App. B, a-5). For Petitioner to make this argument now is also "pointless," as this Court need not address an argument not properly raised below.[6] *See, e.g., Ryder v. United States,* 115 S. Ct. 2031 (1995); *Heller v. Doe,* 113 S. Ct. 2637 (1993); and *United States v. Williams,* 504 U.S. 36 (1992).

IV. THE ELEVENTH CIRCUIT DID NOT DEPART FROM ITS OWN PRECEDENT OR THAT OF OTHER COURTS OF APPEAL BY PLACING THE BURDEN OF PROVING AN EXCEPTION TO THE EXHAUSTION REQUIREMENT UPON PETITIONER.

It remains important that Petitioner never pled or provided sworn evidence in support of his request to be excused from the exhaustion requirement. The burden of proving an exception to the exhaustion requirement rests upon the party seeking to avoid the mandate. *See, e.g., Honig v. Doe,* 108 S. Ct. 592 (1992); *Doe v. Arizona Dept. of Education,* 111 F.3d 678 (9th Cir. 1997); *Gardner v. Sch. Bd. of Caddo Parish,* 958 F.2d 109 (5th Cir. 1992); *Crocker v. Tennessee Secondary Sch. Athletic Ass'n,* 873 F.2d 933 (6th Cir. 1989); *Hall v. United States Postal Service,* 857 F.2d 1073 (6th Cir. 1988); *Riley v. Ambach,* 668 F.2d 635 (2d Cir. 1981). The Eleventh Circuit was correct in placing the burden upon Petitioner and finding that he had not shown an exception to the exhaustion requirement.

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[6] Not only did Petitioner fail to properly raise the futility argument below, he never pled futility nor did he provide appropriate evidence in support of a futility argument.

Because Petitioner has not set forth compelling reasons for the granting of his Petition, Respondent respectfully submits to the Court that it should be denied.

CONCLUSION

For the reasons stated above, Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

AMY TOTENBERG
Counsel of Record
210 Pryor Street
Atlanta, Georgia 30335
(404)827-8959

CHARLES L. WEATHERLY
THE WEATHERLY LAW FIRM
3414 Peachtree Road, NE
Suite 450
Atlanta, Georgia 30326
(404)262-9500